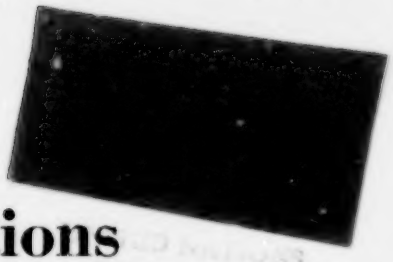

The United Nations and the Development of International Law 1945-1970

UNITED NATIONS

The United Nations and the Development of International Law

1945-1970

by Constantin A. Stavropoulos
The Legal Counsel of the United Nations

In the first 25 years of the United Nations, international law has increased enormously in scope and volume. The number of conferences and meetings which are held annually to regulate topics of international concern has grown steadily, and each year more and more treaties, both multilateral and bilateral, are concluded between Governments. There are, moreover, many more States—the principal subjects of international law; the number of States Members of the United Nations has more than doubled since 1945. While there are no grounds for easy optimism —there are many fields where little progress has been made—international law has shown, on balance, an impressive ability over the past quarter of a century to accept changes and to channel them in forms agreed upon by the majority of the international community. In the following pages I should like to describe, not the alterations in substantive content which have occurred, but the evolution of international law during this period and the part which the United Nations has played in it.

Before doing so I should like to step back and attempt to place international law in what, in my opinion, is the correct perspective. International law has existed in one form or another ever since a system of national communities, each with a consciousness of its own separate identity, came into existence. In their mutual dealings, the very survival of such communities required that they accept at least some basic rules to govern their conduct. There has thus long been a general consensus that international law exists. However, there has never been complete agreement as to its content or why States are required to abide by it, as they do in all but rare cases. Perhaps because of this uncertainty, there has always been a tendency for international law to be either overvalued or undervalued; people have looked to international law as a means which, if applied, could, of itself, change the whole nature of relations between

States, or, failing that, might be dismissed as totally inadequate. Such views can be found reflected in the different attitudes which have been held with regard to international law and to international organizations in the course of the present century. Before 1914 there was a widespread belief that what was needed to save the world was more law; once international law was properly established, it was thought, wars would cease and the world would be a better place. With the advantages of hindsight, we can see that the thinking along these lines proceeded on too optimistic a view of the self-evident powers of reason and on too simple an approach to the question of why States, and people, choose to observe the law. Nevertheless it was with such underlying hopes and assumptions that the League of Nations was set up in 1919 and, with it, the Permanent Court of International Justice, the forerunner of the present International Court of Justice. As evidence of the relatively greater importance given to international law by the League, reference has sometimes been made since 1945 by temporarily despondent international lawyers to the fact that, under the League, it was the First Committee, and not the Sixth Committee, which dealt with legal matters. Nevertheless, despite the achievement of the establishment of the Permanent Court, which produced a steady line of valuable decisions, and the adoption of a number of multilateral treaties on social and economic matters, the League, on the whole, made relatively little headway in the sphere of international law, certainly none to compare with that which the United Nations has managed to achieve. The reasons why this has been so would extend beyond the confines of this article, but I would select two which seem to me the most significant: first, the mood in 1945 was different from that in 1919, and on the whole expectations with respect to international law were more realistic; secondly, the United Nations has been characterized, to a far greater extent than the League, by the need and the ability to meet the demands of change.

Turning then to the United Nations itself, I should like to draw a short but basic division between the part which the United Nations has played in fostering the development of international law in the very widest sense, where international law becomes indeed almost coterminous with much of the work of the Organization itself, and the application and development of legal norms in a narrower, more conventional, sense. The United Nations was set up in 1945 with stronger powers than the League and with a greater range of functions. Having existed for 25 years, it is difficult to imagine the world without it or to calculate the effect it has had over this period on the nature of international relations. The Organization established by the Charter—itself a treaty, as lawyers like to point out—consists of a series of organs which hold regular meetings to discuss matters of international concern and where nearly all States are now represented. A mechanism thus exists which, whatever its inadequacies, regularly formulates collective views with respect to virtually every topic of interest to States. The major develop-

ment in international law which has occurred during the past 25 years has been the creation and operation of this machinery, and it is to this that international lawyers all over the world now turn their attention, as well as to the most basic feature of international relations, namely the existence of independent States. The United Nations does not, of course, except within certain limited fields chiefly concerned with its own internal operation, have direct powers. The most characteristic product of discussion in United Nations organs is the adoption of a resolution. Taken that, in the first instance, the powers of most United Nations organs are purely recommendatory, and having in mind the principle of State sovereignty, it is difficult to categorize the effect of such resolutions and to accommodate them in the traditional pattern of law-making instruments. The theory on the matter is disputed and raises questions of great difficulty. Nevertheless, the regularity of meetings, such as the annual sessions of the General Assembly, the persistance of certain issues, and the process of aligning Members' views on a given topic, has resulted in a situation in which resolutions, most notably those of the General Assembly, have come to play a substantial part in determining State practice in international law and in the creation and the interpretation of international legal obligations. The effect of a resolution may vary from case to case and even from State to State, but it seems undue conservatism to suggest that Assembly resolutions have not, in fact, become one of the principal means whereby international law is now moulded, especially in those instances, ranging from the Universal Declaration of Human Rights of 10 December 1948 to the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960, where the resolution has enjoyed the support of virtually all States Members, both at the time of its adoption and subsequently.

This aspect of the development of international law, which extends over nearly all the fields with which the Organization is concerned, may be distinguished from recourse, within the framework of the Charter, to formal means to settle specific disputes or the adoption of concrete legal rules and instruments. As regards the pacific settlement of disputes, it must be said that experience over the past 25 years has been generally very discouraging. This is not for want of machinery within the Charter itself. Besides the Security Council and the General Assembly, which offer a forum for political settlement, the International Court of Justice, established as one of the principal organs of the United Nations, provides a means of judicial settlement. States have not, however, shown in the great majority of cases the will to avail themselves of these means for a genuine resolution of their international disputes. The fact that only some 46 States, out of 126 Members of the United Nations, have accepted the compulsory jurisdiction of the International Court of Justice, and then often subject to extensive reservations, bears eloquent testimony to this. At the present the International Court of

Justice does not have a single case before it, although this is not, as we all know, for lack of disputes. Nor can it be said that this reluctance has been accompanied by a compensating growth in recourse to the alternative means of settlement listed in Article 33 of the Charter, ranging from negotiation and arbitration to resort to regional agencies or peaceful means of the parties' own choosing. In this sphere, if no other, the past 25 years have witnessed a disappointing lack of progress and it is difficult to envisage any sudden change in the preference of States for keeping a dispute alive, rather than entrusting it to some form of third party settlement which might not come out wholly in their favour.

As regards the development of specific legal rules and norms, under Article 13 of the Charter, the General Assembly was given the express function to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification". What had been a general and inchoate obligation under the League was thus made a specific responsibility of the plenary organ of the United Nations. In order to fulfil the provisions of Article 13, the General Assembly established the International Law Commission in 1947 as a body composed of individuals having recognized competence in international law, which would meet regularly and assist the Assembly in its task. At its first session in 1949, the International Law Commission adopted a long-term programme of work, virtually the only United Nations body which has attempted to itemize the problems before it in this way, even though it was realized from the outset that it would take many years to complete the entire programme. Although the Commission has not concluded its study of all the items on the 1949 list, the Commission is now in the process of examining the original list and of determining what additions and deletions should be made.

The Statute of the Commission makes a distinction "for convenience" between the progressive development of international law, as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States", and codification as meaning "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine". In practice, the Commission has found it difficult to give effect to this distinction, to which decreasing attention has been given. This blurring of categories has been possible because of the quality of the work achieved by the Commission and by the development of a remarkably successful process whereby draft articles prepared by the Commission have been submitted to Member States individually for their comments and to the Sixth Committee, and then revised in the light of the views expressed, before the convening of a plenipotentiary conference to adopt a final convention. This procedure does not work rapidly, but it works at a pace accept-

able to the majority of States, and it has, over the period 1958-1969, resulted in a series of multilateral Conventions which represent the greatest act of codification, in the form of written instruments, which international law has ever recorded. Those Conventions are: the four 1958 Conventions on the Law of the Sea; the 1961 Vienna Convention on Diplomatic Relations; the 1961 Convention on the Reduction of Statelessness; the 1963 Vienna Convention on Consular Relations; the 1969 Vienna Convention on the Law of Treaties; and the 1969 Convention on Special Missions. All of these Conventions, with the exception of that on the reduction of statelessness and those concluded in 1969, are now in force. As regards the contents of these instruments, the Conventions on the Law of the Sea gave written and revised form to the existing law relating to the territorial sea, the high seas, fishing and the conservation of the living resources, and to the continental shelf. The Conventions on Diplomatic and Consular Relations were based on customary law, as is the Convention on Special Missions, although in the latter case it proved necessary to systematize a branch of the law which had previously been little studied. The Convention on the Law of Treaties, which came at the end of almost 20 years work by the Commission and by successive Special Rapporteurs, formally regulates the law relating to the treaty instrument rather than the contents *per se*, but is nevertheless of great importance, so closely are form and content intertwined and so central a part do treaties play in recording the agreement of States to pursue a chosen course of action. These Conventions are by no means exhaustive in the entire corpus even of traditional international law, but they cover a number of staple topics of permanent significance. The function of law as a cohesive element has been reinforced too, not merely by the conclusion of these agreements, but in the number of States which have participated in the codification process. At the Codification Conference held in 1930 under the auspices of the League, 48 States attended. Eighty-six States took part in the 1958 Conference on the Law of the Sea, and by the 1969 session of the Conference on the Law of Treaties the number had risen to 110.

Whereas the International Law Commission was established in order to assist the General Assembly to fulfil its responsibilities under Article 13 of the Charter, the other legal bodies which have been set up by the General Assembly have been concerned with particular questions or issues related to pursuance of more general objectives, such as peace and security or economic development. The United Nations Commission on International Trade Law (UNCITRAL), for example, was set up in 1966 to perform, in relation to international trade law, a role similar to that played by the International Law Commission with respect to international law more generally. UNCITRAL, composed of the representatives of 29 States, holds annual sessions and has established working groups to consider the preparation or the revision of various legal instruments. Priority is currently being given to four topics: the international

sale of goods; international payments; international commercial arbitration; and international shipping legislation, the last-mentioned being studied in response to a request by the United Nations Conference on Trade and Development.

In the case of the International Law Commission and UNCITRAL, separate legal bodies were established by the General Assembly on a permanent basis. The more frequent approach, however, has been either to appoint an *ad hoc* body to deal with a particular question or for a committee having over-all responsibility to establish a sub-committee to deal with legal issues. The latter approach has been followed in two important instances, concerning the peaceful uses of outer space and the international area of the sea-bed. In each case the parent committee has set up a legal sub-committee which has been entrusted with the study of the legal questions involved and the preparation of appropriate legal instruments. As regards outer space activities, this has resulted in the adoption in 1966 of the Treaty on Principles Governing the Activities of States in the Exploration and Uses of Outer Space, including the Moon and Other Celestial Bodies, and of the 1967 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space. Work on a convention on liability for damage caused by the launching of objects into outer space is still continuing. The legal Sub-Committee of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, which began its work in 1969, is concerned with the elaboration of the legal principles and norms which would promote international co-operation in the area of the sea-bed and ocean floor beyond national jurisdiction. Although legal arrangements with respect to this area have yet to be concluded, it is evident that a substantial body of new law will be required in order to provide for the orderly development of the natural resources of the region.

Besides bodies of this character, engaged in the evolution of legal rules to encompass scientific and technological advances, a series of committees and working groups have examined particular legal questions. Two of the most important of these at the present time are the Special Committee on the Question of Defining Aggression and the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which concluded its most recent session, held in April and May of this year, with the unanimous adoption *ad referendum* of a draft declaration. Efforts of this kind have gone side by side with endeavours in other fields—for example the work which the International Law Commission has undertaken with respect to the topic of State responsibility, or the study of means to improve the peace-keeping operations of the Organization, and discussions aimed at securing agreement on disarmament measures—as part of a total process whereby States, acting within the system established by the

Charter, seek to formalize principles and procedures related to the maintenance of peace and security.

Although much remains to be said—about, for example, the legal rules internal to the Organization, such as rules of procedure or international administrative law, or the rules governing co-operation between different international organizations, all of which are of growing importance—mention may be made in conclusion of a distinct and often overlooked aspect of the role which the United Nations has played with regard to international law, namely the efforts it has made to record and disseminate relevant information. Besides the reproduction in the *United Nations Treaty Series* (which now extends to over 600 volumes) of the Treaties registered by States under Article 102 of the Charter, and the publication of the *Yearbook* of the International Law Commission and of the records of the codification conferences, the Secretariat has prepared the volumes in the *United Nations Legislative Series*, the 16 volume *Reports of International Arbitral Awards* and, since 1963, the *United Nations Juridical Yearbook*. In addition, the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law provides fellowships and United Nations legal publications to persons and institutions in developing countries and ensures, through UNITAR, the holding of a regional seminar or training course in international law each year.

In summary of the above, it may be suggested that the demand for new and agreed legal rules—whether that demand is brought about by technological advance as in the case of outer space or sea-bed activities, or by growing pressure for economic or political progress—runs like a connecting thread through all United Nations legal activities. The United Nations, as an institution composed of States, has not been able to meet all the demands which States, as individual entities, have sometimes made upon it, nor have States always been prepared to accept whatever solution international law appeared to provide for their immediate difficulties. Nevertheless international law, as meaning the development and application of a body of legal rules and practices accepted by States, has, over the period since the United Nations was founded, shown a steady progression. Though much remains to be done most notably as regards the peaceful settlement of disputes, the nucleus of a system has been created whereby new law can be made and existing law reinforced by the general endorsement of both the old and the new members of the international community. International law, as reflected in the framework of the United Nations itself and in the more distinct embodiments of opinion which it produces, thus stands revealed in its true function, as a means to secure stability in a shifting universe and as an instrument to introduce those changes which the international community considers will meet its needs.

United Nations Office of Public Information

OPI/411—14790—July 1970—10M